1989

The State of Utah v. Michael W. Alvord : Brief of Respondent

Utah Court of Appeals

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IN THE UTAH COURT OF APPEALS

STATE OF UTAH,	:	
Plaintiff-Respondent	:	
v.	:	Case No. 890120-CA
MICHAEL W. ALVORD,	:	Priority #2
Defendant-Appellant	:	

BRIEF OF RESPONDENT

Appeal from the denial of the defendant's Motion to Suppress evidence in the Third Circuit Court in and for Salt Lake County, State of Utah, West Valley Department, the Honorable William A. Thorne presiding.

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JURISDICTIONAL STATEMENT

Jurisdiction is conferred upon this court pursuant to Section 78-2a-3(2)(d), Utah Code Ann. (1988), whereby a defendant in a criminal action may take an appeal to the Court of Appeals from a final judgment in a Circuit Court.

DETERMINATIVE STATUTORY PROVISIONS

UTAH CODE ANN. SECTION 77-7-2 (1986)

A peace officer may make an arrest under authority of a warrant or may, without warrant, arrest a person:

(1) for any public offense committed or attempted in the presence of any peace officer; "presence" includes all of the physical senses or any device that enhances the acuity, sensitivity, or range of any physical sense, or records the observations of any of the physical senses;

(2) when he has reasonable cause to believe a felony has been committed and has reasonable cause to believe that the person arrested has committed it;

(3) when he has reasonable cause to believe the person has committed a public offense, and there is reasonable cause for believing the person may:

(a) flee or conceal himself to avoid arrest;

(b) destroy or conceal evidence of the commission of the offense; or

(c) injure another person or damage property belonging to another person.

UTAH CODE ANN. SECTION 77-7-15 (1980)

Authority of peace officer to stop and question suspect -- Grounds. A peace officer may stop any person in a public place when he has a reasonable suspicion to believe he has committed or is in the act of committing or is attempting to commit a public offense and may demand his name, address and an explanation of his actions.

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BRIEF OF RESPONDENT

STATEMENT OF FACTS

The State will present additional facts that were not presented by the Appellant. At about 4:00 a.m., about five minutes after finishing a report on a gas theft that had been reported, Officer B.L. Smith caught a glimpse of a gray truck headed westbound on Downington from 200 East. (T: 5) Officer Smith sped up to to get a closer look at the vehicle and saw the truck turn southbound down an alley at about 125 East. (T: 6) Since this occurred only about 45 minutes after the gas theft had occurred, Officer Smith found the vehicle similar enough to pull it over for further investigation. (T: 6)

As Officer Smith approached the vehicle, he noticed a large amount of aluminum and boxes labeled "Jakeman Enterprises" in the bed of the pickup truck. (T: 7) He observed a clean cut driver which matched the suspect description. (T: 5 and 6) Smith testified that at the time he did not realize tnat the truck was a '76 Chevrolet and not a '68 Ford which had been reported as a possible description of

the vehicle of the gas thief. (T: 30). He proceeded to check the gas gage and determined it was barely above empty. He then decided that this was not the gas theft suspect.

However, Officer Smith became suspicious of the scrap metal in the back of the truck. Officer Smith has extensive experience with the crime of scrap metal theft. Smith has been a police officer for 18 years and spent four-and-a-half years as a business burglary detective. He had worked on 2,500 cases, filed over 400 felony complaints and was a fully certified instructor in burglary investigation. (T: 4).

Smith did not think that Alvord's explanation that he obtained the property over the past week made sense because the aluminum showed no signs of weathering, dust, or spotting. (T: 11 and 16). Alvord also indicated that he was on parole to Officer Smith. (T: 16) Smith found out he was on parole for burglary. (T: 17)

Backup officer, Sergeant Gilles who is an expert on burglary, arrived and also thought the scrap metal was stolen. Gilles went immediately to the address on the boxes in the back of the truck to investigate. Within ten minutes, he called Smith to inform him that he had observed fresh drag marks and footprints. (T: 13) Alvord and Parker allowed Smith to see the soles of their shoes for comparison. (T: 13-14). The description of their shoes appeared to be similar to the footprints. (T:14)

Smith detained Alvord and Parker for only 20-25 minutes to investigate the possible criminal activity. After he placed

them under arrest and read them their Miranda rights, Parker waived his right to an attorney and gave the police officers a statement. (T: 23)

SUMMARY OF ARGUMENT

First, Officer Smith had reasonable suspicion of a gas theft to justify the initial stop of the vehicle Alvord was driving. Second, Alvord was not illegally detained by Officer Smith after the initial stop because Officer Smith can pose questions to a citizen as long as he is not detained against his will. Officer Smith also had a reasonable suspicion of metals theft. Third, Officer Smith had reasonable cause to search and arrest Alvord. The trial court's factual evaluation underlying its decision to grant or deny a motion to suppress will not be disturbed unless it is clearly erroneous, since the trial judge is in the best position to assess the credibility of the witnesses. State v. Sierra, 754 P.2d 972, 974 (Utah Ct.App. 1988); State v. Ashe, 745 P.2d 1255, 1258 (Utah 1987). In reviewing the trial court's legal conclusions, a correction of error standard has been applied. Oates v. Chavez, 749 P.2d 658, 659 (Utah 1988); State v Arroyo, 770 P.2d 153 (Utah App. 1989).

ARGUMENT

POINT I. TRIAL COURT'S FINDING THAT OFFICER SMITH HAD REASONABLE SUSPICION OF CRIMINAL ACTIVITY TO JUSTIFY THE INITIAL STOP OF ALVORD'S VEHICLE WAS NOT ERRONEOUS.

Officer Smith acted in accordance with Section 77-7-15, Utah Code Ann. (1982), which provides the following:

> A peace officer may stop any person in a public place when he has a reasonable suspicion to believe he has committed or is in the act of committing or is attempting to commit a public offense and may demand his name, address and an explanation of his actions.

An investigatory stop falls short of an official arrest but the peace officer "must point to specific articulable facts which, together with rational inferences drawn from those facts, would lead a reasonable person to conclude [the suspect] had committed or was about to commit a crime." State v. Trujillo 739 P.2d 85, 88 (Utah App. 1987).

In this case, Officer Smith had a reasonable suspicion that Alvord had committed gas theft because of (1) the reported gas theft about 45 minutes earlier, which he personally completed investigating five minutes earlier; (2) the similarity in appearance of Alvord's vehicle to that involved in the gas theft; (3) the neighborhood Alvord was driving in was near the gas theft; (4) the time of day; (5) the evasive move by Alvord in driving down a dark alley; and (6) Officer Smith's belief that Alvord's vehicle was in fact the suspect vehicle. These facts create a reasonable suspicion of criminal activity to justify the stop. Moreover, "a trained law enforcement officer may be able to perceive and articulate meaning in given conduct which would be wholly innocent to the untrained observer," the officer may assess these facts in the light of his experience. Id. at 88-89. The facts in this case are stronger than other Utah cases where a reasonable suspicion was articulated by the investigating officer.

In State v. Baumgaertel 762 P.2d 2, 3 (Utah App. 1988), a deputy sheriff stopped a pickup truck due to:

> (1) the lateness of the hour; (2) his knowledge that Ernies' Automotive had recently been burglarized several times; (3) that there had been a "rash of burglaries" in the area recently; (4) his "hunch" that the truck was involved in criminal activity; and (5) that he had not seen this particular truck when he had inspected the parking lot fifteen minutes earlier.

The court held that the factors in this case elevated the deputy's decision to "follow the truck from being a mere 'hunch' to a fact sufficient for the deputy to conclude that the occupants of the vehicle may have been engaged in criminal activity." Id. at 4. The court found that the deputy had a reasonable suspicion that the individual was involved in criminal activity to permit a brief investigatory stop.

Also, in State v. Holmes, 107 Utah Adv. Rep. 74, 75 (1989), the police officer's actions were viewed objectively in light of all the circumstances confronting the officer at the time. The following factors were adequate to permit the motor vehicle stop:

> (1) the defendant's "strolling;" (2) her brief conversations with men and looking back toward traffic; (3) the evasive driving pattern; (4) the area is known for its high level of prostitution (not just a high criminal area); (5) the defendant's actions fit the normal scenario of prostitutes on State Street, and (6) the officer's experience in vice enforcement.

The court rejected the defendant's claim of improper purpose for the stop since "[w]hen a police officer sees or hears conduct which gives rise to suspicion of crime, he has not only the right but the duty to make observations and investigations to determine whether the law is being violated; and if so, to take such measures as are necessary in the enforcement of the law." Id. (quoting State v. Folkes, 656 P.2d 1125, 1127 (Utah 1977), cert. denied 434 U.S. 971 (1977)).

The defendant cites to State v. Swanigan, 699 P.2d 718 (Utah 1985), State v. Carpena, 714 P.2d 674 (Utah 1986) and State v. Trujillo, 739 P.2d 85 (Utah App. 1987) to support his case. However, Baumgaertel distinguished these cases in that they involved only general suspicious behavior. In Carpena, "[t]he stop was based merely on the fact that a car with out-of-state license plates was moving though a neighborhood late at night." Carpena, 714 P.2d at 675. Carpena, Trujillo, and Swanigan conclude that time of day and the neighborhood where a defendant was driving could not alone support a reasonable suspicion of criminal activity. The facts in this case do not revolve around general suspicious behavior alone. In our case we have the recent report of the gas theft, the similarity of the vehicle to the suspect description, the time of day, the closeness of the vehicle to the place of the theft and the officer's belief that Alvord's vehicle was the suspect vehicle. Moreover, Officer Smith would have been remiss if he had not stopped the vehicle he believed to be the suspect vehicle.

In addition, Officer Smith did not offer a pretextual reason for the stop in order to investigate the other crime. Officer Smith did not use a traffic violation or "a misdemeanor arrest as a pretext to search for evidence of a more serious crime." State v. Sierra, 754 P.2d 972 (Utah App. 1988). Instead, Officer Smith stopped the defendant's vehicle because he "thought it was the suspect in the gas theft and I wanted to make further investigation." (T: 6). Officer Smith proceeded to investigate the gas theft during which he spotted the incriminating evidence for the metals theft.

POINT II: TRIAL COURT'S FINDING THAT ALVORD WAS NOT ILLEGALLY DETAINED BY OFFICER SMITH AFTER THE INITIAL STOP WAS NOT ERRONEOUS.

Again, Officer Smith acted in accordance with Section 77-7-15, Utah Code Ann. (1982), and within the constitutional guidelines of US v. Merritt, 736 F.2d 223 (5th Cir. 1984), which delineated the three tiers of permissible police encounters as follows: "(1) an officer may approach a citizen at anytime [sic] and pose questions so long as the citizen is not detained against his will; (2) an officer may seize a person if the officer has an "articulable suspicion" that the person has committed or is about to commit a crime, however, the "detention must be temporary and last no longer than is necessary to effectuate the purpose of the stop"; (3) an officer may arrest a suspect if the officer has probable cause to believe an offense has been committed or is being committed." Merritt, 736 F.2d at 230."

The first two levels have both been satisfied here. Alvord had already been pulled over. Officer Smith is free to ask any citizen any question he wants even without articulable suspicion that criminal activity is taking place as long as the citizen is not detained against his will. State v Trujillo, 739 P.2d 85 (Utah App. 1987), and US v Mendenhall, 446 US 544 (1980). There is no showing of duress, coercion, physical contact, threatening behavior or language, or threatening tone of voice on the part of the officers. Alvord and the passenger were not greatly outnumbered by police officers. There is no evidence of a display of guns by an officer, no evidence that appellant was told he could not go, no evidence that appellant did not believe he could refuse to answer questions or leave. Furthermore, the appellant did not argue below that he was compelled to stay and answer questions. In State v Arroyo, 770 P.2d 153 (Utah App. 1989), the Utah Court of Appeals held that issues of coercion should be brought up below and cannot be initiated at the appellate level.

Moreover, after Alvord had been legally pulled over, Officer Smith articulated a reasonable suspicion that Alvord was in the process of committing metals theft and/or possession of stolen metal because of (1) the overloaded, unweathered scrap metal in boxes with "Jakeman Enterprises" printed on them in the back of the truck; (2) the gloves in the front seat; (3) the extensive experience of the officer with scrap metal theft; (4) the defendant's actions fit the normal scenario of scrap metal theft; (5) the time of day; and (6) the evasive

appearing driving of defendant down a dark alley. At this point, Officer Smith had a duty to inquire further. Officer Smith asked defendant his name and an explanation of his actions. This further bolstered Officer Smith's suspicions of theft because Alvord's explanation did not comport with the physical condition of the metal and his name came back showing Alvord to be on parole for burglary.

Officer Smith completed his brief investigation by having Sgt. Gilles go to Jakeman Enterprises nearby where he observed drag marks, bent fence and two sets of shoe prints which matched those of defendant and his passenger. The passenger also admitted the theft.

As in State v. Holmes, 107 Utah Adv. Rep. 74, 75 (1989), the officer could also articulate a usual scenario for this type of crime. Officer Smith testified that he felt from his experience in the past with scrap metal theft:

> [The defendants] would have to park their truck still loaded with the property in an inconspicuous place until the morning when they could go get in line at the different salvage yards and sell their property. So, they cannot unload it, they can't take it during the day when the people are there so they have to do it in the evening or nighttime hours, and all this put together rose my antenna, and says this--this situation determines further investigation to see if a crime has occurred. (T: 33-34).

Certainly in this case, "a trained law enforcement officer may be able to perceive and articulate meaning in given conduct which would be wholly innocent to the untrained observer." Trujillo 739 P.2d at 88.

A recent report of metals theft was not necessary to allow the officer to further investigate possible criminal activity. See State v. Baumgaertel 762 P.2d 2 (Utah App. 1988). Even "[t]hough there may be no probable cause to make an arrest, a police officer may, in appropriate circumstances and in an appropriate manner, approach a person for investigating possible criminal behavior." State v. Whittenback, 621 P.2d 103 (Utah 1980). A brief detention of 20-25 minutes to investigate the possible metals theft was reasonable.

The defendant is correct in asserting that, after discovered, evidence cannot justify the initial stop. However, in this case the stop was not pretextual and not an exploitation of an impermissible stop.

Again, a correction of error standard is applied. Oates v. Chavez, 749 P.2d 658, 659 (Utah 1988); State v. Arroyo, 770 P.2d 153 (Utah App. 1989). And the trial judge's decision will not be disturbed unless it is clearly erroneous. State v. Sierra, 754 P.2d 972, 974 (Utah Ct.App. 1988); State v. Ashe, 745 P.2d 1255 (Utah 1987).

POINT III. TRIAL COURT'S FINDING THAT OFFICER SMITH HAD REASONABLE CAUSE TO SEARCH AND ARREST ALVORD WAS NOT ERRONEOUS.

"What a person knowingly exposes to the public, even in his own home or office, is not a subject of Fourth Amendment protection [citation omitted]." State v. Harris, 671 P.2d 175 (Utah 1983). Alvord should not expect property open in the

back of his truck to be held as private when it can be viewed from the street. The officer made a lawful stop and could easily see the suspicious metals which permitted further inquiry. The search of the vehicle would fall within the plain view exception to warrantless searches.

First the presence of the arresting officer was lawful. The trial court found there was reasonable suspicion for the initial stop of the vehicle. Second, Officer Smith had an unobstructed view of the scrap metal. He was "not required to avert his eyes from that which [was] put before him." State v Cole, 674 P.2d 119, 123 (Utah 1983). Finally, there was reasonable suspicion as articulated by Officer Smith to associate the property with criminal activity which became probable cause after a brief investigation. Moreover, the evidence shows Alvord permitted Officer Smith to look at his shoes when asked during the investigation. Again coercion was never raised as an issue below. In State v Arroyo, 770 P.2d 153 (Utah App 1989), the Utah Court of Appeals held the issue should have been raised below and can't be raised for the first time at the appellate level.

Thus, the arrest of appellant was authorized under Section 77-7-2, Utah Code Ann. (1980). The State disagrees with appellant's statement that only subsection (3) of 77-7-2, Utah Code Ann., applies. Subsection (1) is applicable in that appellant and passenger were engaged in theft of metals, i.e., exercising unauthorized control of the metals and/or were also engaged in the retention of stolen metals when they were

arrested, both of which are crimes in Utah (76-6-404, UCA, 1973 and 76-6-408, UCA, 1979).

CONCLUSION

The trial court was correct in finding that the initial stop of Alvord's vehicle was supported by a reasonable suspicion, pursuant to Section 77-7-15, Utah Code Ann. (1982), that Alvord may have committed a gas theft. The subsequent questioning of Alvord to investigate a metals theft was a constitutionally permissible police encounter under the first two levels delineated in US v. Merritt, 736 F.2d 223, and is supported by a reasonable suspicion of criminal activity. All evidence derived therefrom is admissible in the criminal proceeding against Alvord. Finally, the arrest of Alvord was supported by ample probable cause based on all the evidence gathered during the investigation. Thus, the State asks this Court to affirm the denial of the motion to suppress.

Respectfully submitted this 18th day of August, 1989.

VIRGINIA CHRISTENSEN
Deputy County Attorney

MAILED/DELIVERED a copy of the foregoing to Salt Lake Legal Defender Association, 430 East 500 South, Salt Lake City, Utah 84111, this 18th day of August, 1989.